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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MARY HITCHCOCK MEMORIAL HOSPITAL, *et al.*,
Petitioners,

v.

RICHARD F. KLONOSKI,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the District Court admitted late-discovered documentary evidence proffered by defendants, after an extensive hearing and after concluding that defendants had violated no discovery orders and that their submission was justified under the discovery rules. The District Court also expressly instructed the jury that the evidence went only to damages. Although the jury returned a finding of no liability, the Court of Appeals reversed and remanded for a new trial, finding—contrary to the District Court—that the defendants had violated a District Court discovery order and the Rules of Civil Procedure, and concluding—also contrary to the District Court—that it was "unrealistic to say" that the damages evidence had no effect on the jury verdict.

The question presented is: Can a federal court of appeals, in conflict with this Court's decisions and the decisions of its sister circuits, (1) supplant a district court's factual findings with its own in reviewing a determination under Fed. R. Civ. P. 37(c), and (2) ignore the settled proposition that juries are presumed to follow their instructions?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Mary Hitchcock Memorial Hospital, Hitchcock Clinic, Inc., and Benjamin Mahlab, M.D., were defendants in the District Court and appellees before the United States Court of Appeals for the First Circuit. Pursuant to S. Ct. Rule 29.6, petitioners note that Mary Hitchcock Memorial Hospital and Hitchcock Clinic, Inc., do not have any parent companies or nonwholly owned subsidiaries.

Respondent Richard Klonoski, plaintiff in the District Court and appellant in the Court of Appeals, is the administrator of the Estate of Jolanta K. Klonoski.

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PETITION FOR A WRIT OF CERTIORARI

Mary Hitchcock Memorial Hospital, Hitchcock Clinic, Inc., and Benjamin Mahlab, M.D., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit reversing the District Court and remanding for a new trial is reported at 156 F.3d 255 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court denying plaintiff's motion for a new trial is not reported and is reprinted at App. 51a.

JURISDICTION

The judgment of the First Circuit was entered on September 23, 1998. That Court entered an order denying rehearing and rehearing *en banc* on October 26, 1998.

App. 47a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Rules 26, 37, and 52(a) of the Federal Rules of Civil Procedure are reprinted at App. 78a-81a.

INTRODUCTION

The District Court in this medical malpractice case admitted late-discovered evidence proffered by the defense, crediting defense counsel's representations that the evidence could not have been submitted sooner. The evidence went only to damages and the District Court so instructed the jury. The jury returned a verdict of no liability.

The First Circuit reversed and remanded for a new trial. Although the District Court had found, based on its credibility assessment, that defendants had not violated the discovery rules or its discovery orders, the Court of Appeals found "egregious" violations to have occurred. And although the jury had returned a verdict of no liability and had thus never reached the damages issue, the Court of Appeals concluded that defendants' discovery "misconduct" in submitting late-discovered evidence going solely to damages warranted a new trial.

The Court of Appeals transgressed the limits of its role in two fundamental respects. It ignored the District Court's credibility-based factual findings; and it rejected the "almost invariable" presumption that juries follow their instructions, instead carving out a new (and wholly insupportable) exception for instances of discovery "misconduct." The First Circuit's decision threatens the discretion of the district courts to supervise their own trial proceedings; it threatens the integrity of the jury deliberation process; and it should be reversed.

STATEMENT OF THE CASE

A. Statutory Background

The Federal Rules of Civil Procedure require a party to a lawsuit to timely disclose relevant and discoverable information to the opposing party, so that the parties may obtain "the fullest possible knowledge of the issues and facts before trial." *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). Rule 26 requires, for example, that at least 30 days prior to trial, the parties disclose the names of all potential witnesses and identify all documentary evidence to be used at trial. Fed. R. Civ. P. 26(a)(3). Trial preparation is a fluid process, however, and the Rules recognize that relevant and discoverable information may come to light after the discovery period has closed. Rule 26(e) thus provides that a party must supplement its disclosures if it acquires additional relevant information after responding to a discovery request. *See* Fed. R. Civ. P. 26(e)(1) (requiring party to "supplement at appropriate intervals" its Rule 26(a) disclosures); (e)(2) (requiring party "seasonably to amend" its prior response to an interrogatory, request for production, or request for admission if additional information is learned).

A party that fails to disclose information required by Rules 26(a) or 26(e)(1) is precluded from using that information at trial, *unless* it shows "substantial justification" for its failure to disclose, or the failure to disclose is harmless. Fed. R. Civ. P. 37(c)(1); *Finley* v. *Marathon Oil Co.*, 75 F.3d 1225 (7th Cir. 1996). Rule 37's "substantial justification" and "harmless error" safe harbors, like Rule 26(e)'s supplemental disclosure provision, recognize that circumstances arise where new and relevant information is uncovered at the eleventh hour. *See Williams* v. *Monarch Mach. Tool Co.*, 26 F.3d 228, 230 (1st Cir. 1994) ("Through no one's fault, evidence is sometimes obtained belatedly when a gap in proof is perceived or a new source is uncovered. Discovery aims only to mitigate

surprise, for nothing can eliminate it entirely from trial practice.").[1] Such a circumstance arose in this case.

B. Pre-Trial Proceedings

In May 1993, Jolanta Klonoski was admitted to Mary Hitchcock Memorial Hospital in Lebanon, New Hampshire, under the care of Dr. Benjamin Mahlab, for the delivery of her third child. While in labor, Mrs. Klonoski suffered an intracerebral hemorrhage. She died shortly after delivering a healthy baby. Jolanta Klonoski's husband, Dr. Richard Klonoski, filed suit in federal district court on his own behalf and as administrator of his wife's estate against the Hospital, Dr. Mahlab, and Dr. Mahlab's employer, Hitchcock Clinic, Inc., alleging negligence in their treatment of Jolanta Klonoski and claiming that their negligence had caused her death.[2]

Among the damages claimed by Jolanta Klonoski's estate were damages for Jolanta's loss of enjoyment of life, or "hedonic damages."[3] Although a minor issue in this complex malpractice suit, the question whether the Klonoskis' marriage was a happy one was (both sides agreed) relevant to the estate's claim for hedonic damages. Accordingly, during the discovery period, the District Court issued an order requiring defendants to produce a list of "all persons known by them to possess discoverable information" regarding possible "marital discord" between the

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[1] *See also* Fed. R. Civ. P. 26(a)(3)(C) (advisory committee note to 1993 amendments) ("Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.").

[2] Dr. Eric Sailer, Mrs. Klonoski's primary obstetrician, was also named as a defendant; the District Court directed a verdict for Dr. Sailer at the close of plaintiff's case. Ct. App. J.A. 3717.

[3] The estate also claimed economic damages and damages based on Mrs. Klonoski's pain and suffering. Until he waived his claim during trial, Dr. Klonoski asserted a claim for damages for loss of consortium as well.

Klonoskis. Ct. App. J.A. 550. Defendants disclosed the fifteen witnesses known to them at the time. *Id.* 583.

Also during discovery, defendants requested Dr. Klonoski to identify all people "having knowledge of facts underlying this litigation," and each person "likely to have discoverable information" relevant to the disputed facts alleged in the complaint, as well as the address and telephone number of each such person and the nature of the information the person was believed to possess. *Id.* 499-500.[4] Among the individuals Dr. Klonoski identified in response to defendants' request was Jolanta Klonoski's father, Tadeusz Rozmyslowski. *Id.* 501. Dr. Klonoski identified only the town in Poland where Mr. Rozmyslowski lived, stated only that he had placed a phone call to his father-in-law after his wife's death, and did not identify any other discoverable information Mr. Rozmyslowski was believed to possess.

C. Trial Proceedings

1. *The Letters*

Until trial began in January 1997, it appeared to defendants that Dr. Klonoski alone would offer testimony about his marriage to Jolanta, and that the quality of the Klonoskis' marriage would not play a major role in plaintiff's case-in-chief. The first two witnesses called, however, signaled otherwise. Those witnesses—never disclosed during discovery and added to plaintiff's witness list after the jury was empanelled, ostensibly only as "rebuttal" witnesses—testified about the state of the Klonoskis' marriage, collectively conveying the impression that the marriage was happy. *See* Ct. App. J.A. 1018, 1935-37, 1051-52.[5]

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[4] This information falls within the initial disclosure requirements of Fed. R. Civ. P. 26(a)(1)(A); the Federal District Court for the District of New Hampshire has opted out of that subsection.

[5] The two new witnesses were added to plaintiff's "May Call" witness list ostensibly in response to the addition of a late-

In response to the plaintiff's strategic shift, and lacking other avenues of investigation, defendants hired an investigator in Poland to find Jolanta Klonoski's father. Fifteen days into trial, the investigator discovered that Mr. Rozmyslowski had died. He also discovered Jolanta Klonoski's sister, Marta Rozmyslowski, who had lived with her father in Poland. Dr. Klonoski had not identified Jolanta's sister in his interrogatory responses.

Defense counsel learned of the investigator's discovery on the day Dr. Klonoski began his direct testimony, a Thursday. While acknowledging that his marriage to Jolanta had been troubled in the past, he testified that at the time of her death, the marriage was "great." Ct. App. J.A. 3476; *see id.* 3440-91, 3537. In fact, as Dr. Klonoski stated in his brief to the Court of Appeals, his testimony "constituted an emotional love story." Appellants' Br. 23.

After trial recessed that day, defense counsel learned for the first time that Marta Rozmyslowski possessed letters from Jolanta describing the Klonoskis' marriage. Three letters, written in Polish, were faxed from Poland to defense counsel's office. Skeletal translations suggested that the letters contradicted Dr. Klonoski's testimony about the state of the marriage, and defendants made arrangements for the letters to be translated as quickly as possible. A fourth letter was faxed to New Hampshire just before trial Friday morning and was immediately sent to the translator.

Dr. Klonoski completed his direct testimony on Friday morning and defendants began their cross-examination. At the lunch recess that day, defense counsel finally obtained partial translations of Jolanta's letters. Following the lunch recess, counsel asked Dr. Klonoski, who was fluent in Polish, to translate those portions of the letters discuss-

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discovered defense witness, a former co-worker of Jolanta Klonoski's. *See* Ct. App. J.A. 575 (order granting defendants' motion to amend "May Call" witness list); *id.* 588 (plaintiff's motion to amend "May Call" witness list).

ing the Klonoskis' marriage. Plaintiff objected to the introduction of the letters.

At the ensuing sidebar, defense counsel explained to the District Court that defendants' investigator had found Marta Rozmyslowski on Wednesday, that defense counsel had received untranslated copies of the letters late Thursday, and that they had had the letters translated overnight and into Friday morning. *See* App. 66a.[6] Although plaintiff's counsel repeatedly questioned defense counsel's representations, the District Court "accept[ed] that they did just find out as [defense counsel has] represented to me." *Id.* 68a.

When plaintiff's counsel continued to object, the court explained: "You took the initiative to put on the evidence of a good marriage, stable marriage. Everything's hunky-dory and wonderful. * * * If they just got this and they're going to use it for impeachment, I think they have a right to do it." *Id.* 69a. After defense counsel stated that the letters should be admissible "[n]ot just for impeachment," but as the statement of a party opponent under Fed. R. Evid. 801(d)(2), *id.*, the court stated, "All right. I'll allow their use * * *. They'll be admissible under Rule 801(d)(2)." *Id.* 70a. Jolanta's letters were shown to Dr. Klonoski and authenticated, but were not read, translated, or admitted into evidence that day.

The following trial day, Dr. Klonoski filed a motion to exclude Jolanta's letters, and the District Court heard extensive oral argument on the motion. Defendant's counsel explained that defendants had not obtained the letters earlier because Marta Rozmyslowski had never been identified by the plaintiff as having discoverable information. Ct. App. J.A. 3802.[7] Counsel also reiterated that he had

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[6] The Court of Appeals erroneously stated that defense counsel had received the letters "two days prior to the start of their cross-examination." App. 35a; *id.* 36a (same).

[7] Dr. Klonoski testified on direct examination that his wife corresponded regularly with her family, including her sister, Ct. App. J.A. 3463, 3488, but he never disclosed Marta Rozmyslowski's name

not received the letters until after Dr. Klonoski had testified on direct examination Thursday, and had not been able to get them translated until midday on Friday. *Id.* 3802-03. The District Court again stated that it "accept[ed] [counsel's] representation." *Id.* 3810.

The District Court next carefully examined the proffered letters, concluding that it would admit only narrow excerpts into evidence, namely, "those statements that directly speak about [Jolanta's] unhappiness in the marriage, but not in histrionic terms and not in terms that pose a risk of appealing to the passion, prejudice of the jury, and not in terms that pose a risk of putting Dr. Klonoski in such a bad light that that might affect an award in this case." *Id.* 3827; *see id.* 3827-29. By admitting only the portions of the letters that give Jolanta's "contrary view" of the marriage, "without the inflammatory baggage of the other statements and comments in the letters," the court concluded that both parties' interests were "fairly protected." App. 72a.

At the close of the hearing, the District Court observed that plaintiff's counsel's frustration with the late-discovered evidence was understandable, but pointedly stated, "not that [defense counsel] violated my order of disclosure. *I find that you've not.* And not that you had the document in a—in a timely fashion that you could have delivered them to the plaintiffs in a meaningful timely way. *I find you didn't.*" *Id.* 73a (emphases added). The District Court thus expressly ruled that defendants had not violated its discovery order. As it likewise expressly con-

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or the existence of correspondence during discovery. *See id.* 3801-02 ("The letters were never mentioned by Dr. Klonoski at deposition. We had asked for information * * * as to people who might have relevant information in the case, and Marta was not identified"). As defense counsel observed, "if anybody had access to this information during the course of a year and a half or 18 months, 19 months of litigation, it was Dr. Klonoski having access through relatives[;] * * * he knew who they were and where they were, and we didn't." *Id.* 3804-05.

cluded that defendants could not have delivered the letters to plaintiff's counsel any sooner than they did, the District Court also implicitly found defendants' failure to disclose the letters prior to trial was "substantial[ly] justifi[ed]" under Rule 37(c).

The court ultimately allowed only the following sentences, culled from twenty pages of letters, into evidence:

> Despite the fact that I want to save this marriage very much, I cannot stand being treated as a moron, but that's how Richard likes to behave. I think he will never appreciate me as a person and will always expect from me obedience and approval of anything he proposes. This does not satisfy me and does not provide even a bit of happiness. [Ct. App. J.A. 3854.]
>
> Now I am with him not for myself but for the children and I know that the day will come when we separate because I will not stand being with him to the end of my life. [*Id.* 3855.]
>
> And I knew that something was wrong. I did not have to wait long because in the evening he came to my bed and graciously informed me that on May 5, 6 and 7 he flies for California, San Diego, for another conference. I could not believe it but he said nobody was going to change his plans. After that last conference I told him I do not want him to ever fly without me. [*Id.* 3856.]
>
> As you can see, I think we should get a divorce because we are tormenting each other and no good will come between us. I only pity this yet to be born child because it will never see love between its parents. Sooner or later both I and he will not be able to stand this tension and misery between us any more. [*Id.* 3856-57.[8]]

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[8] At the close of the defense case, Dr. Klonoski took the stand in rebuttal. He testified that he had no inkling that his wife was unhappy in her marriage, and that, having learned of his wife's true feelings, he waived all rights to the proceeds of her estate, assigning his rights to their children. Ct. App. J.A. 3859.

2. The Jury Instructions And Verdict

At the hearing on plaintiff's motion to exclude Jolanta's letters, the District Court observed that the letters were relevant only to the estate's claim for hedonic damages, *see* Ct. App. J.A. 3811, 3816, 3823, 3826-27, and informed the parties that it would issue a limiting instruction to that effect. *Id.* 3813.[9] At the close of the case, the court duly instructed the jury:

> Ladies and gentlemen, as to this last item, loss of enjoyment of life, you have heard a fair amount of evidence related to discord in the Klonoski marriage, and I want to make sure you understand what that evidence is relevant to and what it is not relevant to. It is relevant only on the issue of damages, and even then, only in a limited way. [*Id.* 3988.]

The District Court went on to instruct the jury that if it found, "based on the evidence, that there was discord in her marriage, you may take that into account and may give it such weight as you deem appropriate in fairly assessing the effect of marital discord on the loss of enjoyment of life Mrs. Klonoski suffered * * *." *Id.* 3989.

The court also instructed the jury that it was not permitted to "compromise between the liability issue and the damages issue. You must determine the issue of liability first. You should proceed to the damages issue only if you have determined that one or more of the defendants' liability has been proven." *Id.* 3985. Finally, the District Court gave the jury this caution:

> As with limiting instructions regarding the proper use of evidence, it might seem to you to be difficult to, quote, put things out of your mind, closed quote, for one purpose but not for another, but it can be done with reasonable effort and mental discipline. Judges do it regularly, and you as judges of the facts

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[9] Plaintiff did not object to the limiting instruction or suggest that it was inadequate.

> certainly can do it as well, as it is your sworn duty to do so. [*Id.* 3990-91.]

The jury returned a verdict for defendants, finding no liability. It accordingly never reached the damages issue.

3. *The Denial of Plaintiff's New Trial Motion*

Following the jury verdict, plaintiff moved for a new trial pursuant to Fed. R. Civ. P. 59, claiming, among other things, that the belated disclosure of Jolanta's letters had prejudiced his case. After hearing lengthy oral argument, the District Court issued a 20-page order denying the motion. It began by observing that when plaintiff had first sought to offer evidence about the state of the Klonoskis' marriage, the court had "fairly advised plaintiff's counsel that contradictory evidence—to show that the marriage was not all that wonderful—would also be admissible." App. 56a. The court then stated that defense counsel had "represented to the court, on the record, that only after trial started did they discover and obtain copies" of Jolanta Klonoski's letters to her sister, *id.*—implicitly crediting, for the third time, defense counsel's representations—and that it had admitted only limited excerpts from the late-discovered letters, excluding large portions of the letters "on grounds that the sentiments expressed and language used might prove unfairly distracting." *Id.* 56a-57a.

The District Court also reminded the plaintiff that it had "carefully explain[ed] to the jury the very limited purpose of that evidence," giving a "pointed" instruction to that effect following closing arguments. *Id.* 57a; *see also id.* 57a-58a (quoting jury instruction). The court was "satisfied that the jury fully understood and followed its instructions regarding the 'marital discord' evidence." *Id.* Under those collective circumstances, the court stated, it could not conclude that the jury had returned a defendants' verdict because they were "blindly prejudiced against Mrs. Klonoski's estate by her own negative comments about the quality of her marriage." *Id.* Dr. Klonoski appealed the

District Court's judgment to the Court of Appeals for the First Circuit.

D. The First Circuit's Decision

Concluding—unlike the court below—that the defendants had committed "egregious" violations of the District Court's discovery order and the discovery rules, the Court of Appeals reversed the District Court and remanded for a new trial.

The First Circuit began with the observation that defendants had failed to comply with Fed. R. Civ. P. 26(a)(3)(C), which requires parties to identify the documents they will or may use at trial "at least 30 days before trial." App. 24a-25a. The Court of Appeals likewise concluded that defendants had not complied with Fed. R. Civ. P. 26(e), requiring timely supplementation of discovery, because they had not "add[ed] the letters in question to the list of evidence to be offered at trial." *Id.* 28a.

The court next turned to whether preclusion of the letters under Rule 37(c) was the appropriate remedy for defendants' purported violation of the discovery rules. Pointedly ignoring the Rule's express caveat that a failure to disclose evidence may be excused if "substantial[ly] justifi[ed]," Fed. R. Civ. P. 37(c)(1), the court stated that Rule 37(c) was "mandatory: a party that fails to make the required disclosures 'shall not, unless such failure is harmless, be permitted to use [undisclosed] evidence at a trial.'" App. 29a (quoting Rule 37(c)(1)) (alteration in opinion). The Court of Appeals accordingly concluded, again with no reference to the "substantial justification" language of the Rule, that defendants' failure to disclose Jolanta's letters pursuant to Rule 26 "precluded defendants from using the letters at trial." *Id.* 30a-31a.

According to the Court of Appeals, the District Court found otherwise "because it found the letters to fall within an exception to the discovery rules for material that is presented 'solely for impeachment purposes.'" *Id.* (quoting

Fed. R. Civ. P. 26(a)(3)). This, the Court of Appeals held, was error, because the evidence was admitted for substantive as well as impeachment purposes. *Id.* 32a-33a. The District Court had therefore "erred, as a matter of law," in admitting excerpts from Jolanta Klonoski's letters. *Id.* 33a.

The Court of Appeals rejected defendants' contention that a new trial was unwarranted because the letter excerpts went only to damages, the District Court had expressly instructed the jury to that effect, and the jury had found no liability. Conceding that defendants' argument had "surface appeal," the Court of Appeals nonetheless concluded that where an "egregious breach of discovery rules" had been committed, a new trial was warranted *despite* the District Court's express limiting instruction on the use of the late-discovered evidence. *Id.* 41a. "We cannot know with certainty what impact the letter excerpts had on the jury," the court explained, "but to dismiss what happened as harmless error would render the discovery rules and orders issued thereunder useless." *Id.* 43a. Because the Court of Appeals concluded it was "unrealistic to say that [the letters] had no effect on the jury's determination of liability," *id.*, it held that the District Court had abused its discretion in declining to grant a new trial. *Id.* 45a. Defendants' timely petition for rehearing and suggestion for rehearing en banc were denied. *Id.* 48a.

REASONS FOR GRANTING THE WRIT

In its zeal to correct an "egregious" discovery violation not found below, the Court of Appeals overstepped its bounds in two crucial respects. First, in second-guessing the District Court's factual findings on a discovery issue, the Court of Appeals stripped the lower court of its broad discretion to manage the trial proceedings. Second, in ignoring the settled presumption that juries follow their instructions, the Court of Appeals improperly interposed itself into the decisionmaking function of the jury panel. This Court should take the opportunity presented by this

case to affirm the two fundamental principles the First Circuit's decision has called into question.

I. IN REVIEWING THE DISTRICT COURT'S DISCOVERY RULINGS, THE COURT OF APPEALS REPLACED THE TRIAL COURT'S FACTFINDING WITH ITS OWN, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

Crediting the representation of defense counsel that Jolanta Klonoski's letters to her sister could not have been obtained or disclosed any earlier than they were, *see* App. 68a, the District Court made a factual finding that the defendants could not have "delivered [the letters] to the plaintiffs in a meaningful timely way." *Id.* 73a. From that factual finding, the court drew two legal conclusions, one explicit and one implicit. The court expressly held that defendants had not violated its July 1996 discovery order requiring them to disclose all people known by them to have information bearing on the marital discord issue. *Id.*[10] The court's factual finding was also the predicate for its implicit ruling—necessary for admission of the letters into evidence at that late stage—that defendants' belated disclosure was "substantial[ly] justifi[ed]" under Fed. R. Civ. P. 37(c).[11]

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[10] Plaintiff, of course, had not identified Marta Rozmyslowski in his discovery responses, much less notified defendants that she had information bearing on the Klonoskis' marriage.

[11] The court did not specifically recite the "substantial justification" language of the Rule in admitting excerpts of the letters, but it did not have to. As the Fifth Circuit recently stated, Rule 37 does not require "express findings of fact or conclusions of law concerning the existence of substantial justification." *United States v. $9,041,598.68*, —— F.3d ——, No. 97-20413, 1998 WL 876908, at *11 (5th Cir. Dec. 15, 1998). The district judge's in-court statements that he credited the representations of defense counsel, that counsel had not violated his discovery order, and that counsel could not have provided the documents any sooner, were sufficient to invoke Rule 37's "substantial justification" safe harbor. *See id.*; *see*

1. The District Court's decision to admit Jolanta Klonoski's letters into evidence was reviewable only for abuse of discretion. *Newman* v. *GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995); *Williams*, 26 F.3d at 230 (recognizing that "great deference must be afforded to the judge on the spot in devising the proper remedy" for late-disclosed evidence); *see also Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988) ("It is especially common for issues involving what can broadly be labeled 'supervision of litigation' * * * to be given abuse-of-discretion review"); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

The predicate finding to the court's discovery ruling—that the defendants could not have obtained or disclosed Jolanta's letters any sooner than they did—was a finding of fact, reviewable only for clear error under Rule 52(a). *See Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (holding that "[d]eference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them"); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*"). The clear error standard of Rule 52(a)

> plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. [*Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985).]

Factual findings based on credibility determinations, as the District Court's were in this case, are treated with

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also Amadeo v. *Zant*, 486 U.S. 214, 228 (1988) (district court's "lack of precision * * * is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding").

"even greater deference" by a reviewing court, because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575. Accordingly, to hold that the admission of Jolanta Klonoski's letters constituted an abuse of discretion, the Court of Appeals had to conclude that the District Court's factual findings based on counsel's representation were clearly erroneous, and therefore that no "substantial justification" existed for admission of Jolanta's letters at trial. *See Newman,* 60 F.3d at 156.

The First Circuit did not hold that the District Court's predicate findings of fact were clearly erroneous. It simply ignored them. No fewer than seven times in its opinion, the Court of Appeals stated that the defendants had violated the District Court's discovery order and the federal discovery rules. *See* App. 33a (introduction of letters "violated the pretrial discovery orders of the district court and federal discovery rules"); *id.* 36a ("The belated appearance of the letters violated the plain meaning and the intent of the discovery rules. It also ignored the specific requirements of the court's pretrial discovery orders."); *id.* 38a ("Clearly the introduction of the letters * * * violated the pretrial discovery order"); *id.* 41a (stating that defendants had committed "an egregious breach of discovery orders and the discovery rules"); *id.* 43a ("there was, intentional or otherwise, an egregious breach of the discovery orders and the discovery rules"); *id.* 45a ("There was a clear violation of the court's pretrial discovery orders and the requirements of the discovery rules."). The Court of Appeals' factfinding led it to another conclusion never reached—or even discussed—in the District Court: that defendants had committed discovery "misconduct." *See id.* 41a-43a.[12]

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[12] No hearing had been called or held on the issue of defense counsel's "misconduct" below, of course, as the District Court found that no misconduct occurred. The Court of Appeals' unilateral conclusion that defendants' "egregious" violations amounted to

The Court of Appeals' conclusion that defendants had committed an "egregious breach" of the discovery orders and rules was an out-and-out rejection of the District Court's factual finding—predicated on a credibility determination it was uniquely positioned to make—that defense counsel could not have disclosed the documents any sooner than they did. Indeed, the First Circuit's opinion is rife with suggestions, and at times outright statements, that it did not believe defense counsel's representations. *See, e.g.*, App. 35a ("We cannot help being impressed by the exquisite timing of the injection of the letters into the trial. * * * Whether by design or accident the timing could not have been better"); *id.* 36a (concluding that defendants had no "excuse[] for their failure to comply" and "offered no *legitimate* explanation for why they waited as long as they did" to disclose letters) (emphasis added); *id.* 37a n.10 (rejecting defense counsel's representation that investigators were sent to find Jolanta's father based on the testimony adduced at trial); *id.* 43a ("there was, *intentional or otherwise,* an egregious breach" of discovery orders and discovery rules) (emphasis added). In concluding that defendants had committed an "egregious breach" of the discovery rules, in the face of the District Court's factual determination that defendants could not have made timely disclosure of Jolanta Klonoski's letters, the Court of Appeals ignored the District Court's credibility-based factfinding and supplanted it with its own. *See Icicle Seafoods, Inc.* v. *Worthington,* 475 U.S. 709, 713 (1986) (reversing court of appeals decision where "nowhere in its opinion did the [appellate] court ever mention any of the factual findings of the District Court, much less discuss or analyze them").

The First Circuit's utter "failure to give due regard to the ability of the District Court to interpret and discern the credibility" of defense counsel's representations, *Anderson,* 470 U.S. at 577, brings its decision into conflict

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"misconduct" thus completely deprived defense counsel of an opportunity to marshal evidence or contest the serious charges leveled against them.

with the scores of cases in this Court and in the federal courts of appeal establishing that findings of fact are reviewed only for clear error, and that credibility determinations are matters "peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U.S. 412, 426 (1985). *See, e.g., Daff* v. *United States*, 78 F.3d 1566, 1574 (Fed. Cir. 1996) (credibility determinations on which factual findings are based are "virtually unreviewable") (citation omitted); *Hormel Foods Corp.* v. *Jim Henson Prods., Inc.*, 73 F.3d 497, 502 (2d Cir. 1996) (court of appeals must give special deference to district court's determination of credibility).

2. In an effort to palliate its overt factfinding, the Court of Appeals opined that the District Court had committed an error of law in admitting Jolanta's letters. It concluded that the District Court had admitted the letters under "an exception to the discovery rules for material that is presented 'solely for impeachment purposes,' " App. 31a (quoting Fed. R. Civ. P. 26(a)(3)), which the Court of Appeals declared to be legal error. App. 33a; *see id.* 46a (concluding that district court's findings of no discovery violation "stemmed from its legally incorrect ruling that the letters fell within [Rule 26(a)(3)'s] impeachment exception").

But of course the District Court never ruled that Jolanta's letters were admitted solely for impeachment purposes.[13] Quite the contrary, it expressly admitted the letters for all purposes, as admissions of a party opponent under Fed. R. Evid. 801(d)(2). *See* App. 70a ("All right. I'll allow their use * * *. They'll be admissible under Rule 801(d)(2)."). The trial court's clear ruling is bolstered by this equally clear fact: the District Court did not admit the letters into evidence until defendants' case-in-chief, long after Dr. Klonoski had left the stand, when they served as rebuttal to Dr. Klonoski's testimony. *See*

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[13] The Court of Appeals understandably was unable to identify *where* in the record the District Court's purported ruling occurred.

Ct. App. J.A. 3850-57; *see also* Appellant's Br. 43 ("[T]he defendants did not offer the letters solely for impeachment purposes, but substantively as party admissions * * *. The District Court initially admitted the letters for this purpose, although subsequently limiting their use as evidence bearing on hedonic damages.").

The Court of Appeals' creation and rejection of a phantom legal ruling should not obscure the real issue in this case: whether the District Court abused its discretion in concluding, based on a factual finding subject to review only for clear error, that defendants' failure to disclose Jolanta Klonoski's letters before they did was substantially justified. *See Cooter & Gell,* 496 U.S. at 403 (observing that "whether a legal position is 'substantially justified' depends greatly on factual determinations" the district court is " 'better positioned to make' ") (quoting *Pierce,* 487 U.S. at 560). The District Court accepted counsel's representations, expressly finding that the letters could not have been "delivered * * * to the plaintiffs in a meaningful timely way." App. 73a. The Court of Appeals ignored that finding of fact, supplanting it with its own.

3. In rejecting—in a footnote, no less—the District Court's express holding that defendants had not violated its July 1996 discovery order, *see* App. 36a n.9, the Court of Appeals also abruptly departed from the settled principle that reviewing courts must give "particular deference to the district court's interpretation of its own order." *In re Fine Paper Antitrust Litig.,* 695 F.2d 494, 498 (3d Cir. 1982); *see also Home Port Rentals, Inc.* v. *Ruben,* 957 F.2d 126, 131 (4th Cir.) (it is "peculiarly within the province of the district court * * * to determine the meaning of its own order"), *cert. denied,* 506 U.S. 821 (1992); *Kendrick* v. *Bland,* 931 F.2d 421, 423 (6th Cir. 1991) ("The District Court's interpretation of its own order is * * * entitled to great deference."); *Anderson* v. *Stephens,* 875 F.2d 76, 80 n.8 (4th Cir. 1989) (recognizing "in-

herent deference due a district court when it construes its own order"); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 784 F.2d 831, 834 (7th Cir. 1986) ("The district court best knows the meaning of its own orders.").

A court of appeals is not entitled to "substitut[e] [its] judgment for that of the district judge in interpreting his own order," *SEC* v. *Sloan*, 535 F.2d 679, 681 (2d Cir. 1976), *cert. denied*, 430 U.S. 966 (1977), but that is exactly what the First Circuit did here. The district judge—in the best position to know—expressly concluded that defendants had not violated his discovery order. Showing *no* deference to that credibility-based determination, much less "particular deference," the Court of Appeals concluded not just that defendants had violated the district judge's order, but that they had committed an "egregious breach." App. 41a; *see id.* 43a.

The First Circuit's decision should not be allowed to stand. Courts of appeal are deferential supervisors of district courts' discovery rulings, no more, and the First Circuit overstepped its role. In rejecting the District Court's ruling based on its new and contradictory interpretation of the facts found by the trial judge, the Court of Appeals brought itself into conflict with decisions of this Court and of its sister circuits. The conflict should be addressed and remedied.

II. THE COURT OF APPEALS IGNORED THE PROPOSITION THAT A JURY IS PRESUMED TO FOLLOW ITS INSTRUCTIONS, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

Correctly recognizing that letter excerpts discussing Jolanta Klonoski's marriage had limited utility at best in this medical malpractice action, the District Court pointedly instructed the jury that evidence of marital discord was relevant *only* to its determination of hedonic damages, and that it was required to reach a liability determination

before proceeding to the damages issue. Ct. App. J.A. 3985, 3988-89. The jury never reached the damages issue; it returned a verdict of no liability. On plaintiff's motion for a new trial, the District Court observed that it had expressly instructed the jury that it was to consider marital discord evidence only with respect to damages, and that it was "satisfied that the jury fully understood and followed its instructions regarding the 'marital discord' evidence." App. 59a.

The Court of Appeals, however, decided otherwise. Again stating—contrary to the express conclusion of the District Court—that defendants had committed an "egregious breach" of the discovery rules, the court concluded that it "[could] not know with certainty what impact the letter excerpts had on the jury," but that finding harmless error under the circumstances would "render the discovery rules and orders issued thereunder useless." App. 43a. It also concluded that where the evidence was introduced at a "key point" in trial, it was "unrealistic to say" that its admission did not affect the jury's liability determination. *Id.* From that the Court of Appeals concluded that the District Court had abused its discretion in not granting the plaintiff's motion for a new trial. *Id.* That holding is in direct conflict with prior decisions of this Court and of every other federal court of appeals.

1. It is an "almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). *See, e.g., Zafiro* v. *United States*, 506 U.S. 534, 540 (1993) ("Juries are presumed to follow their instructions.") (quoting *Richardson*, 481 U.S. at 210); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985) ("we must assume that the jury followed the court's instructions").[14]

[14] *Accord United States* v. *Millsaps*, 157 F.3d 989 (5th Cir. 1998); *Sims* v. *Singletary*, 155 F.3d 1297, 1312 (11th Cir. 1998); *United States* v. *Salameh*, 152 F.3d 88, 116 (2d Cir. 1998), *cert. denied*, No. 98-7145 (Jan. 19, 1999); *United States* v. *Linwood*,

That settled presumption may be overborne only in exceptional circumstances. In *Bruton* v. *United States*, 391 U.S. 123, 136 (1968), for example, this Court held that a criminal defendant was deprived of his Sixth Amendment right of confrontation when a co-defendant's confession incriminating the defendant on its face was admitted at a joint trial—even if the jury had been instructed to consider the confession only against the co-defendant. The Court concluded that in that narrow circumstance, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135.

As this Court later put it in *Richardson*, the strong presumption that juries follow their instructions may be overborne only where there exists an "overwhelming probability" that the jury was unable to comply with the court's charge, 481 U.S. at 208, and the evidence improperly admitted was "devasting to the defense." *See, e.g., United States* v. *Colombo*, 909 F.2d 711, 715 (2d Cir. 1990) (presumption that jury could follow limiting instruction overborne where prosecutor had linked criminal RICO defendant to rape and sodomy as background information); *compare Richardson*, 481 U.S. at 211 (co-defendant's confession which does not facially incriminate defendant admissible with limiting instruction); *Spencer* v. *Texas*, 385 U.S. 554 (1967) (evidence of defendant's prior criminal convictions could be introduced for the purpose of sentence enhancement, as long as jury instructed

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142 F.3d 418, 425 (7th Cir.), *cert. denied*, 119 S. Ct. 224 (1998); *United States* v. *Vaulin*, 132 F.3d 898, 901 (3d Cir. 1997); *Aguilar* v. *Alexander*, 125 F.3d 815, 820 (9th Cir. 1997); *Mason* v. *Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1456 (10th Cir. 1997); *Gee* v. *Groose*, 110 F.3d 1346, 1349 (8th Cir. 1997); *Holmes* v. *City of Massillon*, 78 F.3d 1041, 1047 (6th Cir.), *cert. denied*, 117 S. Ct. 312 (1996); *United States* v. *Francisco*, 35 F.3d 116, 120 (4th Cir. 1994), *cert. denied*, 513 U.S. 1133 (1995); *Weinar* v. *Rollform Inc.*, 744 F.2d 797, 811 (Fed. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

not to consider the evidence in determining guilt); *Vaulin*, 132 F.3d at 901 (prosecutor's question to cooperating witness regarding "death threats" concededly not made by defendants cured by jury instruction). In the civil arena, the presumption that juries follow their instructions is rebutted only in the rarest of circumstances. *See, e.g., Warner* v. *Rossignol*, 538 F.2d 910, 911-912 (1st Cir. 1976) (counsel's wholly unsubstantiated references to plaintiff's "permanent brain injury" during entire course of "run-of-the-mill tort action" too prejudicial to cure with instruction).

The First Circuit did not even pay lip service to the nearly unassailable presumption that juries follow their limiting instructions. Instead, it stated that it could not "know with certainty what impact the letter excerpts had on the jury." App. 43a. That uncertainty, as this Court has acknowledged, exists each and every time a district court gives a limiting or curative instruction—but the "almost invariable assumption" that juries follow those instructions remains. *Richardson*, 481 U.S. at 206. As this Court stated in *Richardson*, "[t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted *less in the absolute certitude that the presumption is true* than in the belief that it represents a reasonable practical accommodation of the interests" of both parties to the proceeding. 481 U.S. 211 (emphasis added). The fact that the Court of Appeals could not be "certain[]" as to the impact of the damages evidence on the jury's liability determination is entirely beside the point.

2. In sidestepping the strong presumption that juries follow their instructions, the First Circuit invented a distinction between cases involving discovery "misconduct" and other cases in which limiting instructions are used. *See* App. 41a. That distinction is unprecedented and insupportable. This Court has never intimated that misconduct, whether it be discovery misconduct, prosecutorial misconduct, or any other sort, is exempted from the

"almost invariable" presumption that juries follow their instructions. *Richardson*, 481 U.S. at 206. In *Greer* v. *Miller*, 483 U.S. 756, 766 (1987), for example, this Court concluded that a curative instruction following an improper question on cross-examination was sufficient to erase the effects of the prosecutor's misconduct and to preserve a criminal defendant's due process rights.

The courts of appeal are aligned against the First Circuit as well. In *Mason* v. *Oklahoma Turnpike Authority*, 115 F.3d at 1456, the appellant argued that various instances of misconduct throughout the course of trial—including an attempt by opposing counsel to offer into evidence deposition excerpts not designated in advance—required a new trial. Observing that the district judge had issued curative instructions following the most serious instances of counsel's misconduct, the Court of Appeals refused to order a new trial. *Id. See also United States* v. *Badger*, 983 F.2d 1443, 1456 (7th Cir.) (prosecutorial misconduct in closing argument cured by instruction), *cert. denied*, 508 U.S. 928 (1993); *Corwin* v. *Johnson*, 150 F.3d 467, 477 (5th Cir.) (refusing to grant habeas relief where prosecutor's remark in closing argument that jury could "reasonably assume from the evidence that there are more dead women out there that we just haven't found out about" was found by state court of appeals to have been cured by instruction), *cert. denied*, 119 S. Ct. 613 (1998).

The First Circuit relied on *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988), to support its unprecedented distinction between limiting instructions given following so-called "discovery misconduct" and limiting instructions given under other circumstances. The defendants in *Anderson* intentionally withheld discoverable evidence harmful to their case (and, unlike this case, the district court so found) until *after* a jury verdict had been rendered and the case was on appeal. 862 F.2d at 922. Because the information at issue was withheld until the

case was on appeal, the district court was never presented with the opportunity to cure the misconduct prior to verdict, and the presumption that juries follow their instructions was in turn never triggered. Thus, even assuming the District Court had made *any* finding of misconduct—which it did not—*Anderson* cannot be read to support the Court of Appeals' decision to carve out an exception to the firm presumption that juries will follow their instructions in instances of "discovery misconduct." [15]

3. To bolster its decision to grant a new trial despite the District Court's limiting instructions, the First Circuit also stated that it was "unrealistic" to say that the evidence had no effect on the jury's determination as to liability "where, as in this case, undisclosed evidence [was] introduced at a key point in the trial." App. 43a. If taken at face value, this statement eviscerates Rule 37's safe harbors for *all* evidence going to damages, outside the rare (and disfavored) circumstance where liability and damages issues are bifurcated at trial. If previously undisclosed damages evidence is introduced at what the appellate court concludes was a "key point" in the trial, the First Circuit's opinion requires retrial, no matter how ironclad the limiting instruction given below. The First Circuit's opinion also suggests the anomalous proposition that *every* case presenting both liability and damages issues—which is to say, nearly every case brought to trial—must be bifurcated, as the jury may no longer be assumed to follow an instruction to decide liability before damages, and to keep the issues separate.

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[15] The First Circuit's reliance on *Perez-Perez* v. *Popular Leasing Rental, Inc.*, 993 F.2d 281 (1st Cir. 1993), is misplaced for the same reason. The district court in that case gave no instruction directing the jury to consider the evidence at issue only for a limited purpose, and the strong presumption that juries abide by their instructions thus never arose.

III. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

Departing from the strictures of Rule 52(a) and from this Court's teaching in *Anderson* v. *Bessemer City*, the First Circuit disregarded the factual findings supporting the District Court's discovery ruling and made its own instead. The First Circuit also strayed from its sister circuits in looking over the district judge's shoulder with respect to his interpretation of his own discovery order—an interpretation entitled to the utmost deference on appeal. These were no small missteps; the Court of Appeals, charged with the responsibility to review deferentially the discovery rulings of its lower courts, simply ignored the limitations on its role. Nor should this be regarded as merely an aberration; the decision calls into serious question the nature and extent of abuse-of-discretion review by the courts of appeals, and may well prompt other circuits to expand improperly their review of district court decisions not susceptible to a finding of clear error, but with which they simply disagree.

The Court of Appeals' decision to override the jury verdict of no liability and remand for a new trial contravened a second elementary principle: a jury verdict prefaced with firm (and unchallenged) limiting instructions on the proper use of evidence may not be questioned absent the most extraordinary cause. The assumption that juries follow their instructions is "almost invariable," *Richardson*, 481 U.S. at 206, and the Court of Appeals' refusal to recognize or employ that presumption brings its decision into conflict with this Court and its sister circuits. The effect of the decision in this regard is as potentially wide-reaching as the court's assumption of the role of fact-finder in reviewing the District Court's discovery ruling; the Court of Appeals again transgressed its role, in the most fundamental way.

The First Circuit's departure from this Court's precedents and from the holdings of its sister circuits on two

fundamental grounds suggests that this Court should take this opportunity to reaffirm the court of appeals' proper role as deferential supervisor of district court discovery rulings and jury verdicts. The role of the court of appeals in reviewing discovery orders and a jury verdict predicated on strong limiting instructions is strictly circumscribed. The First Circuit's decision to transgress the limits on its proper role should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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